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UNREASONABLE EXPECTATIONS: WHY PALAZZOLO HAS NO RIGHT TO TURN A SILK PURSE INTO A SOW'S EAR

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Abstract: Did the State of Rhode Island commit a regulatory taking when it denied Anthony Palazzolo the right to fill the salt marsh on his property? The answer suggested here is no. Under "background principles" of state property and nuisance law, in particular the public trust doctrine, owners of coastal property in Rhode Island have never enjoyed an unqualified right to fill tidal wetlands. In the absence of the express or implied permission of the state, no one has the right to fill, and thereby destroy, these important public trust resources. The remand of the *Palazzolo* case affords the Rhode Island courts an opportunity to clarify the scope and effect of the public trust doctrine and provide guidance for other state courts facing similar challenges.

> *Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might permit.*[1]

INTRODUCTION

Anthony Palazzolo is a frustrated man. For some time now he has been trying to fill the salt marsh on his coastal Rhode Island property, if for no other reason than that it is his, by God. But the State of Rhode Island keeps saying no. For Palazzolo, the last straw was the denial in 1986 of his latest application for a fill permit under Rhode Island's Coastal Resource Management law. Palazzolo claims that, in the immortal words of Justice Holmes, the State has gone "too far" and has taken his property for a public purpose without payment of just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.[2]

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[1] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

[2] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 615–16 (2001); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

But what is it exactly that the State supposedly took from Palazzolo? The property interest he claims is the right to fill eighteen acres of salt marsh on his twenty-acre parcel to create a "beach club," or maybe a subdivision (his exact plans are unclear). Regardless, the key question is whether Palazzolo ever had a right to dredge and fill in inter-tidal wetlands. Was that stick in the "bundle of rights" he got with the title he acquired in 1978? After reviewing "background principles" of Rhode Island property and nuisance law, particularly the application of the public trust doctrine to tidal marshes, I conclude the answer is no; Palazzolo has not been deprived of any compensable interest.

I. Background: A Little Salt Marsh Ecology

Why anyone would want to turn a salt marsh into a beach club is beyond me, since salt marshes are infinitely more interesting than beach clubs. Salt marshes are the crown jewels of the wetlands kingdom. Acre for acre, salt marshes are among the most biologically productive ecosystems on earth.[3] They rival the richest agricultural land in terms of organic output, generated by the lush *Spartina alterniflora* grasses that grow there and nowhere else.[4] The marsh is the biological membrane that connects the land with the sea, nurturing a rich diversity of life forms—aquatic, terrestrial, marine, and freshwater species—in a dynamic, complex mosaic of habitats that provide the structure, function, and composition necessary to insure the ecological integrity of this vibrant natural—and human—community.[5]

The coast is a people magnet. From time out of mind, humans have been drawn to the shore to harvest the bounty of the sea; to build homes, businesses, and summer cottages; to engage in commerce and recreation; and to savor the beauty, power, and mystery of the ocean. One half of the American population live in coastal areas.[6] The natural values that make the seashore so attractive to people are

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[3] *See* Ralph W. Tiner, Jr., U.S. Fish & Wildlife Serv., Wetlands of Rhode Island 59–60 (1989) [hereinafter Wetlands of Rhode Island].

[4] *See* Robert H. Chabreck, Coastal Marshes: Ecology and Wildlife Management 21–27 (1988). *See generally* John Teal & Mildred Teal, Life and Death of the Salt Marsh (Ballantine Books 1991) (1969).

[5] *See generally* John M. Teal, *Salt Marshes: They Offer Diversity of Habitat*, 39 Oceanus 13 (1996).

[6] Geoffrey S. Becker et al., Cong. Research Serv., Report 97-588 ENR: Oceans and Coastal Resources: A Briefing Book, 23 (May 30, 1997), *available at* http://www.cnie.org/nle/crsreports/briefingbooks/oceans/a3.cfm.

sustained by the ecological processes that drive the system, and the salt marsh is a critical part of this system. Understanding what salt marshes do, what collective interests they serve, and what consequences flow from their destruction, provides important clues to balancing the rights and responsibilities of property owners when conflicts arise over development within these areas.

The list of good works, or "ecosystem services," that salt marshes perform for human communities is extensive. The marsh is a food factory, producing the detritus, or organic matter, that nourishes the complex web of life within the coastal ecosystem.[7] The marsh is a nursery and refuge for a diverse array of fish and shellfish, producing the brood stocks that support commercial and recreational fisheries of enormous economic, nutritional, and cultural significance to the nation.[8] The marsh acts as a filter helping to maintain the chemical, physical and biological integrity of coastal waters by removing pollutants, recycling nutrients, and trapping sediments.[9] It is a natural flood control mechanism, absorbing storm surges, slowing runoff, and reducing erosion.[10] It is a carbon sink, helping to regulate the climate by controlling the greenhouse gases that contribute to global warming.[11] Coastal marshes are the last refuge of many threatened and endangered species of plants and animals.[12] They are also great places to see birds of all kinds—ducks and geese, herons and egrets, willets and rails, hawks and ospreys—and to simply enjoy the sights, sounds and invigorating sea breezes. All of these benefits, and many others, are provided free of charge by nature's economy, the legacy of millions of years of evolution. No human labor produced these fruits and no government mandate created these benefits. They are part of the natural capital upon which this and future generations must draw for survival and prosperity.

Which brings us to Mr. Palazzolo's marsh. His parcel is an interconnected piece of a much larger (146-acre) salt marsh associated

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[7] *See* WETLANDS OF RHODE ISLAND, *supra* note 3, at 59–60.

[8] *See id.*

[9] *See generally* WETLANDS FUNCTIONS AND VALUES: THE STATE OF OUR UNDERSTANDING (P.E. Greeson et al. eds., 1979) [hereinafter WETLANDS FUNCTIONS AND VALUES].

[10] *See* P.L. Knutson et al., *Wave Damping in Spartina Alterniflora Marshes*, 2 WETLANDS 87, 87–104 (1982).

[11] *See* Robert M. Friedman & Calvin B. DeWitt, *Wetlands as Carbon and Nutrient Reservoirs: A Spatial, Historical, and Social Perspective*, *in* WETLANDS FUNCTIONS AND VALUES, *supra* note 9, at 175–85.

[12] *See* William A. Niering, *Endangered, Threatened, and Rare Wetland Plants and Animals of the Continental United States*, NAT'L WETLANDS NEWSL., May–June 1987, at 16–19.

with Winnapaug Pond, one of the great salt ponds that run the length of the Rhode Island coastline like a string of pearls. Salt ponds, or coastal lagoons, are shallow, productive estuarine embayments separated from the ocean by coastal dunes and barrier spits. They provide prime habitat for commercial and recreational fish and shellfish, as well as resting and feeding stops for waterfowl, wading birds, and other wetland-dependent birds migrating along the Atlantic seaboard.[13] Rhode Island's salt ponds have been an important source of fish and shellfish from the time of the first human inhabitants. Archaeological evidence from the 1600s indicates the tremendous bounty yielded to native peoples that inhabited these areas and to the colonists who followed.[14] Salt ponds have been and continue to be an important part of the cultural and economic life of coastal residents, a defining feature of this "bio-region." Salt ponds and salt marshes are an ecological unit, nested within a larger marine ecosystem.

Winnapaug Pond is directly connected to Rhode Island Sound by an artificial canal called a "breachway." Some thirty-nine species of fish breed in the pond, including commercially valuable species such as blue fish and striped bass, as well as the forage fish on which many other species depend.[15] The pond also produces shellfish including quahogs, soft-shell clams, mussels, and scallops, supporting a burgeoning aquaculture industry.[16] The pond is a focal point for tourism, supporting numerous hotels, restaurants, and other businesses. It is a natural amenity that enhances the value of surrounding properties.

Salt ponds are especially vulnerable to water quality problems related to the density of development. Salt pond watersheds are relatively small; the Winnapaug Pond watershed is only 2000 acres. Bacterial contamination and nutrient enrichment are the principal threats to water quality in estuaries in Rhode Island and nationwide.[17] Septic systems, the most common form of sewage disposal in coastal communities, chronically fail, especially in the mucky peat-like soils of the marsh, making them the leading source of bacteria and nitrogen

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[13] *See* FRANCIS GOLET ET AL., R.I. DEP'T OF ENVTL. MGMT., SALT MARSH RESTORATION MONITORING AT THE GALILEE BIRD SANCTUARY, NARRAGANSETT, R.I. 17–19 (2000).

[14] VIRGINIA LEE, UNIV. OF R.I. COASTAL RES. CTR., AN ELUSIVE COMPROMISE: RHODE ISLAND COASTAL PONDS AND THEIR PEOPLE 22 (1980).

[15] State's Memorandum Regarding Remand at 37, Palazzolo v. State (No. 99-333-A).

[16] *Id.*

[17] *See* COASTAL RES. MGMT. COUNCIL, RHODE ISLAND'S SALT POND REGION: A SPECIAL AREA MANAGEMENT PLAN 25 (1984). *See generally* U.S. RES. MGMT. COUNCIL, NATIONAL WATER QUALITY INVENTORY: 1994 REPORT TO CONGRESS (1995).

loadings in coastal waters.[18] Nitrogen is the essential nutrient in marine ecosystems, the fertilizer that drives the growth of phytoplanktons (algae). A little nitrogen is a good thing. Too much and you get runaway algal blooms, which deplete oxygen as they decay, causing eutrophication, and choking the life out of the salt pond.[19]

Nitrogen creates other problems. As it mixes with groundwater it produces nitrates and nitrites. High levels of nitrates in drinking water can cause adverse health effects, particularly in infants, because it interferes with oxygen supplies in the bloodstream ("blue baby" syndrome).[20] Nitrates are highly mobile in groundwater, making them a threat to drinking water supplies in many communities. Under the Safe Drinking Water Act, EPA has set a "maximum contaminant level" of ten parts per million for nitrates.[21] A number of coastal communities in Rhode Island already exceed that level.[22]

II. WHO OWNS THE MARSH?

It should be clear by now that development in coastal marshes poses particularly difficult environmental and public health problems that complicate the job of sorting out private and public rights. Coastal wetlands involve a complex mixture of land and water rights—private, common, and public. Simply declaring someone an "owner" without examining the use and proposed development of the property in relation to its surroundings and the rights of others is an empty exercise. Ownership does not carry with it the right to build anything anywhere. Property is a creation of law, not a divine right.[23] Property rights advocates often quote philosopher and legal scholar Jeremy Bentham's remark that "Property is the noblest triumph of

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[18] *See generally* SCOTT W. NIXON ET AL., UNIV. OF R.I. GRADUATE SCH. OF OCEANOGRAPHY, NUTRIENT INPUTS TO RHODE ISLAND COASTAL LAGOONS AND SALT PONDS: FINAL REPORT TO RHODE ISLAND STATEWIDE PLANNING (1982); Scott W. Nixon & Michael E.Q. Pilson, *Nitrogen in Estuarine and Coastal Marine Ecosystems*, *in* NITROGEN IN THE MARINE ENVIRONMENT 565–648 (Edward J. Carpenter & Douglas G. Capone eds., 1983).

[19] *See* Virginia Lee & Stephen Olsen, *Eutrophication and Management Initiatives for the Control of Nutrient Inputs to Rhode Island Coastal Lagoons*, 8 ESTUARIES 191, 191–202 (1985); Scott W. Nixon, *Coastal Marine Eutrophication: A Definition, Social Causes, and Future Concerns*, 41 OPHELIA 199, 199–219 (1995).

[20] *See* COASTAL MGMT. RES. COUNCIL, RHODE ISLAND'S SALT POND REGION: A SPECIAL AREA MANAGEMENT PLAN (MAUSHAUG TO POINT JUDITH PONDS) ch. 1, at 6 (1999) [hereinafter SALT POND S.A.M.P.].

[21] 40 C.F.R. § 141.32(e)(20) (2002).

[22] *See generally* SALT POND S.A.M.P., *supra* note 20, ch. 3.

[23] *See* Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 863 n.16 (2000).

humanity over itself."[24] But Bentham also had this to say on the subject of property as a natural imprescriptible right: "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts."[25] For Bentham, founder of utilitarianism, the test of moral right lay in whether human action produced "happiness or pain" for the community as a whole.

Bentham's views are reflected in the thinking and writing of those who shaped the Constitution such as Thomas Jefferson who wrote:

> It is agreed by those who have seriously considered the subject, that no individual has, of natural right, a separate property in an acre of land, for instance. By an universal law, indeed, whatever, whether fixed or movable, belongs to all men equally and in common, is the property for the moment of him who occupies it; but when he relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society.[26]

Similarly, Benjamin Franklin observed:

> [T]he public has the right to regulate descents, and all other conveyances of property, and even of limiting the quantity and uses of it. . . . But all property superfluous to [that which is necessary for an individual's subsistence] . . . is the property of the public, who by their laws, have created it, and who may therefore by other laws dispose of it, whenever the welfare of the public shall demand such disposition.[27]

And finally, it was Thomas Paine who wrote: "Man did not make the earth, and, though he had a natural right to *occupy* it, he had no right to *locate* as *his property* in perpetuity any part of it; neither did the Creator of the earth open a land-office, from whence the first title-

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[24] *See generally* TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES (1998).

[25] JEREMY BENTHAM, *Nonsense Upon Stilts, reprinted in* THE COLLECTED WORKS OF JEREMY BENTHAM: RIGHTS, REPRESENTATION, AND REFORM 330 (Philip Schofield et al. eds., 2002).

[26] Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 576 (Adrienne Koch & William Peden eds., 1993).

[27] WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 21–22 (1977).

deeds should issue."[28] In short, neither property nor the police power involves an absolute right. Each must be examined in the context of a specific place and time. That inquiry follows.

III. Palazzolo's Legal Journey: A Long and Winding Road

The saga begins with the acquisition of the property in 1959 by Shore Gardens, Inc. (SGI), a closely-held corporation controlled by Anthony Palazzolo (Palazzolo).[29] After a series of unsuccessful efforts to develop the property in the 1960s, SGI let it sit idle for more than a decade while two important events occurred. First, in 1971, Rhode Island enacted coastal zone management legislation, creating the Coastal Resource Management Council (CRMC).[30] The CRMC adopted the Coastal Resources Management Plan (CRMP), which included regulations designating salt marshes, like those on SGI's property, as protected "coastal wetlands," on which development was to be strictly limited.[31] Second, in 1978, SGI's corporate charter was revoked for nonpayment of taxes, and title to SGI's property passed by operation of Rhode Island state law to Palazzolo personally as SGI's sole shareholder.[32]

In 1983, Palazzolo resumed his efforts to develop the property. However, his application to build a bulkhead along the shore of Winnapaug Pond and to fill the entire marsh, with no stated purpose, was denied by the CRMC on the basis that it would have significant environmental impacts and conflicted with the CRMP.[33] In 1985, he tried again, with a somewhat scaled down proposal to fill eleven acres and build a gravel parking lot and private beach club, consisting of a few picnic tables, barbecue grills, and portable toilets.[34] The Council denied this application in 1986 on the ground that Palazzolo had failed to make the regulatory showing of a "compelling public need" to justify a special exception to the ban on filling coastal wetlands.[35]

Palazzolo then filed an inverse condemnation action in state court, claiming the State's wetland regulations, as applied to his parcel, had taken his property without compensation in violation of the

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[28] Thomas Paine, *Agrarian Justice*, *in* The Pioneers of Land Reform 184 (1920).
[29] Palazzolo v. Rhode Island, 533 U.S. 606, 613 (2001).
[30] *Id.* at 614.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 614–15.
[34] *Id.* at 615.
[35] *Palazzolo*, 533 U.S. at 615.

Fifth and Fourteenth Amendments. The suit asserted that the regulations deprived him of "all economically beneficial use" of his property, resulting in a total taking requiring compensation under *Lucas v. South Carolina Coastal Council*.[36] He sought damages of $3.1 million based on an appraisal of the value of a hypothetical seventy-four-lot subdivision. The trial court ruled against Palazzolo on several grounds, including that the proposed filling and subdivision development would create a nuisance.[37] On appeal, the Rhode Island Supreme Court affirmed the lower court's decision, discussing three issues: first, that the takings claim was not ripe because Palazzolo had not fully explored uses of the property that would involve less wetland filling; second, that Palazzolo had no right to challenge regulations that predated his 1978 acquisition of the property; and third, that the claimed deprivation of all economically beneficial use was contradicted by the undisputed evidence that he had $200,000 in development value remaining on the upland portion of the property.[38]

The U.S. Supreme Court granted *certiorari* and reversed in part and affirmed in part.[39] The Court first held that the federal takings claim was ripe on the ground that the CRMC had made it clear that no filling of the wetlands would be permitted, and it would have been futile for Palazzolo to pursue alternative proposals.[40] Next, the Court held that Palazzolo's acquisition of title after the regulations' effective date did not automatically bar his takings claim.[41] Finally, the Court upheld the Rhode Island Supreme Court's finding that Palazzolo had not been deprived of all economic use of the property, and thus, did not have a valid *Lucas* claim for a "categorical" taking, because the record established that a home valued at over $200,000 could be built on the upland portion of the property.[42] Nevertheless, the Court decided that Palazzolo was entitled to pursue a claim for a partial taking under *Penn Central Transportation v. City of New York*.[43] *Penn Central* requires an examination of three factors: (1) the extent to which the

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[36] *Id.* at 615–16; *see* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

[37] *See* Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 88-0297, 1997 WL 1526546, at *6 (R.I. Super. Ct. Oct. 24, 1997), *aff'd on other grounds sub nom.* Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part, remanded sub nom.* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[38] Palazzolo v. Rhode Island, 533 U.S. 606, 630–31 (2001).

[39] *Id.* at 632.

[40] *Id.* at 625–26.

[41] *Id.* at 630.

[42] *Id.* at 630–31.

[43] *Id.* at 632 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)).

regulation has interfered with reasonable, investment-backed expectations; (2) the economic impact of the regulation on the claimant; and (3) the character of the government action.[44] The Court remanded the case to the state courts for an analysis of these factors.

In her concurring opinion, Justice O'Connor made it clear that pre-existing regulations must be taken into account "under the rubric of investment-backed expectations in determining whether a compensable taking has occurred."[45] In this respect Justice O'Connor broke sharply with Justice Scalia, who argued in a concurrence that the existence of a pre-acquisition regulation was irrelevant: "In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the 'background principles of the State's law of property and nuisance') should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking."[46] Because the four dissenting Justices agreed with her, Justice O'Connor's concurring opinion is controlling on this point.[47]

On September 25, 2001, the Rhode Island Supreme Court issued an order concluding that a remand to the superior court would be necessary to conduct a *Penn Central* analysis.[48] The Rhode Island Supreme Court invited counsel for the parties to comment on four specific issues including "the relevance of the Public Trust Doctrine as described in *Greater Providence Chamber of Commerce v. State*,[49] to the reasonable investment-backed expectations of plaintiff Palazzolo."[50]

IV. The "Logically Antecedent Inquiry": Did Palazzolo Have the Right to Fill the Marsh in the First Place?

Did Palazzolo have the right to fill the marsh in the first place? Surprisingly, this fundamental question has never been squarely addressed in the twelve years that the *Palazzolo* case has been in the

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[44] *Penn Cent.*, 438 U.S. at 124.

[45] *Palazzolo*, 533 U.S. at 635–36 (O'Connor, J., concurring).

[46] *Id.* at 637 (Scalia, J., concurring) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1229 (1992)) (citations omitted).

[47] *See id.* at 633 (O'Connor, J., concurring); *id.* at 643 n.6, 644–45 (Stevens, J., concurring in part, dissenting in part); *id.* 654 n.3 (Ginsburg, Souter & Breyer, JJ., dissenting); *id.* at 654–55 (Breyer, J., dissenting).

[48] Palazzolo v. State *ex rel.* Tavares, 785 A.2d 561, 561 (R.I. 2001) (order remanding the case to the superior court and directing counsel to submit further memoranda).

[49] 657 A.2d 1038 (R.I. 1995).

[50] Palazzolo v. State *ex rel.* Tavares, 785 A.2d at 561 (order remanding the case to the superior court and directing counsel to submit further memoranda).

courts. Justice Stevens noted it in his dissent in *Palazzolo v. Rhode Island*, but concluded that, for purposes of reviewing the threshold jurisdictional issues of ripeness and claim bar, the Court must assume that Palazzolo had the right to fill "at some point in the not-too-distant past."[51] However, if the right to fill was not in Palazzolo's bundle of rights to begin with, then nothing was taken by the CRMC's denial of the permit in 1986, even if the denial had resulted in a total "wipeout."[52] The Court in *Lucas v. South Carolina Coastal Council* further explained that such severe limitations "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[53]

Whether these "background principles" must derive from common law or can also be found in statutory law has been the subject of considerable debate in the post-*Lucas* cases and commentary. Accordingly, the following discussion considers both possibilities with regard to the application of the doctrines of public trust and nuisance as they have been incorporated into the laws and judicial decisions of Rhode Island.

V. The Public Trust Doctrine as a Background Principle

The public trust doctrine has its roots in Roman law, which recognized that all persons were entitled to the use of natural resources including the air, flowing water, the sea, and the seashore.[54] The Romans sought to protect public uses for fishing, navigation, shellfish, seaweed collection, bathing, conservation, and aesthetics. The English adopted the Roman concept by defining the public trust to encompass all lands beneath the tidewaters.[55] The English brought this concept to the Colonies, and it was incorporated into early American jurisprudence.[56]

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[51] 533 U.S. 606, 640 (2001) (Stevens, J., concurring in part, dissenting in part).

[52] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

[53] *Id.* at 1029.

[54] J. Inst. II.1.1.

[55] Matthew Hale, *A Treatise De Jure Maris et Brachiorum Ejusdem*, *in* A History of the Foreshore and the Law Relating Thereto 370–413 (Stuart A. Moore ed., Wm. W. Gaunt & Sons, Inc. 1993) (1888).

[56] *See* Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 Stan. Envtl. L.J. 247, 254–55 (1996).

The U.S. Supreme Court has played a major role in defining the geographic scope, content, and legal effect of the public trust doctrine.[57] In *Shively v. Bowlby*, the Court held that the State of Oregon, and not a pre-statehood grantee, held title to riparian land at the mouth of the Columbia River that was below the high water mark:

> At common law, the title and dominion in lands flowed by the tide were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.
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> . . . .
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> The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.[58]

In *Phillips Petroleum Co. v. Mississippi*, the Court expanded the reach of the public trust doctrine to include all tidally-influenced waters regardless of whether they are navigable.[59] At issue in *Phillips* was the ownership of land—and the oil and gas deposits—underlying a number of bayous and streams associated with the Jourdan River in southwestern Mississippi. The Court found that the Jourdan, a navigable tributary flowing into the Gulf of Mexico, was subject to the "ebb and flow" of the tide.[60] Phillips Petroleum claimed exclusive rights under a title traceable to the Spanish land grants, but the State of Mississippi claimed it had acquired a public trust interest in the lands when it entered the Union. Phillips Petroleum argued that the public trust doctrine was limited to tidelands under navigable waters. However, the Supreme Court disagreed, noting that "even where tidelands are privately held[,] . . . public rights to use the tidelands for the purposes of fishing, hunting, bathing, etc., have long been recognized."[61] The Court further stated that "[l]imiting the public trust

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[57] *See* Virginia S. Albrecht & Deidre G. Duncan, *The Public Trust Doctrine and the Navigational Servitude as "Background Principles," in* INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY, 403, 405–07 (A.L.I.-A.B.A. COURSE OF STUDY, May 3, 2001), *available in* Westlaw, SF64 ALI-ABA 403.

[58] 152 U.S. 1, 57 (1894).

[59] 484 U.S. 469, 479–80 (1988).

[60] *Id.* at 472.

[61] *Id.* at 483 n.12.

doctrine to only tidelands under navigable waters might well result in a loss to the public of some of these traditional privileges."[62] Accordingly, the Court held that title to the lands in question passed to the State when it entered the Union under the "equal footing" doctrine and were now part of the corpus of the public trust.[63] Importantly, however, the Court qualified its holding by stating that it was up to the individual states to "define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[64]

The broad reach of this holding was underscored by Justice O'Connor in dissent, who noted that "[a]lthough there is no way to predict exactly how much land will be affected by the Court's decision, the magnitude of the problem is suggested by the fact that more than 9 million acres have been classified as fresh or saline coastal wetlands."[65] Justice O'Connor went on to say, "To the extent that the conveyances to private parties purported to include public trust lands, the States may strike them down, if state law permits."[66]

VI. The Public Trust Doctrine in Rhode Island

Rhode Island has recognized the English common law public trust doctrine since the colonial era.[67] In *Greater Providence Chamber of Commerce v. State*, the Rhode Island Supreme Court succinctly recapped this history:

> The principle espoused by the English common-law public trust jurisprudence recognizes the unique resource that tidal waters constitute and the necessity that they be held by the sovereign in a trustee capacity for the use and benefit of all citizens. Thus these lands below the high-water mark will not be appropriated by, or conferred upon, private individuals for purely private benefit. It is this principle that forms the foundation of the public-trust doctrine in Rhode Island as well as in the other states.[68]

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[62] *Id.*

[63] *Id.* at 484–85.

[64] *Id.* at 475.

[65] *Phillips Petroleum*, 484 U.S. at 494 (O'Connor, J., dissenting).

[66] *Id.*

[67] *See generally* Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island's Shore*, 24 Suffolk U. L. Rev. 313 (1990).

[68] 657 A.2d 1038, 1042 (R.I. 1995).

The Rhode Island Constitution, originally adopted in 1843, incorporates the customary right of the public to enjoy the "privileges of the shore," as follows:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.[69]

From its earliest decisions, the Rhode Island Supreme Court has recognized that the State holds legal title to the soil under tide waters in trust for the public.[70] At the same time, the court has also recognized a qualified common law right to "wharf-out" in order to gain access to navigable waters, as long as the construction did not interfere with navigation or the rights of other riparian landowners.[71]

Thus, Rhode Island law recognizes both *jus publicum* and *jus privatum* rights in tidal waters. The case law clearly shows that the *jus pri-*

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[69] R.I. CONST. art. I, § 17 (1843).

[70] Allen v. Allen, 32 A. 166, 166 (R.I. 1895) ("The state holds the legal fee of all lands below high-water mark . . . ."); Gerhard v. Seekonk River Bridge Co., 5 A. 199, 200 (R.I. 1886) ("Title to the soil under tide-water is in the state . . . ."); Bailey v. Burges, 11 R.I. 330, 331 (1876) ("In this state, at common law, the fee of the soil in tide waters below high water-mark is in the state."); *see* Engs v. Peckham, 11 R.I. 210, 223–25 (1875).

[71] Nugent *ex rel.* Collins v. Vallone, 161 A.2d 802, 805 (R.I. 1960); *see* Providence Steam-Engine Co. v. Providence & Stonington S.S. Co., 12 R.I. 348, 363 (1879) (Potter, J., concurring) ("In this State it has always been understood that the riparian owner has the right to wharf or embank against his land, and so make land from tide-water, and this without license, provided he does not interfere with the navigation."); *see also* Clark v. Peckham, 10 R.I. 35, 38 (1871).

vatum component is a qualified right requiring the express or implied permission—or at the very least the acquiescence—of the state.[72]

The common law right to wharf-out has also been limited by various statutes over the years. One of the earliest was the 1896 Harbor Commissioners Act,[73] which created a board of harbor commissioners to "protect and develop the rights and interests of the state in such harbors and public waters."[74] Among other things this law authorized the commissioners to "regulate the depositing of mud, dirt, and other substances in the public tide-waters of the state, and [to] prescribe the places where the same may be deposited."[75] Any person wishing to build a wharf or fill tidelands was required to "give written notice to the harbor commissioners of the work they intend to do, and submit plans of any proposed wharf or other structure and of the flats to be filled."[76] Much of the coastal filling that has occurred in Rhode Island was done under harbor lines authorized by the commissioners or by the legislature.

Maintaining public access to navigation has not been the only concern of the courts and the legislature in Rhode Island. Conservation of fish and shellfish has long been an important element of the public trust in coastal wetlands.[77] As the critical role of coastal marshes in the productivity of fisheries became better understood, the

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[72] *Nugent*, 161 A.2d at 805 ("assent [by those exercising a regulatory authority] to [a] proposed pier was sufficient, as far as the state was concerned"); Dawson v. Broome, 53 A. 151, 157 (R.I. 1902) (filling accomplished "under leave of the state"); Walsh v. Hopkins, 48 A. 390, 391 (R.I. 1901) (filling "by sufferance and not by right"); Brown v. Goddard, 13 R.I. 76, 81 (1879) (although a riparian landowner had no title to the tide-flowed land he did have a "potential title by virtue of his right to fill out under leave of the State"); *Bailey*, 11 R.I. at 331 ("It is true the riparian proprietor may fill out in front of his land, but, if he does so, he fills out by the permission or acquiescence of the state . . . ."). As the Rhode Island Supreme Court clearly stated in *Carr v. Carpenter*,

> The state may not give up its right to control the private rights, as well as the public ones, but it may suffer the littoral proprietor to acquire as against all the world but itself these private rights which naturally fall to him as the first appropriator, so that he becomes by the common law of the state the owner of these rights, with the exclusive power to exercise them as long as this does not interfere with the public rights of which the state reserves control.

48 A. 805, 805–06 (R.I. 1901).

[73] R.I. GEN. LAWS §§ 3–5, 10–12, 14 (1896) (current version at R.I. GEN. LAWS §§ 46-1-2, 46-6-1 to 46-6-6 (2001) (R.I. GEN. LAWS § 46-6-5 repealed 2002).

[74] *See* R.I. GEN. LAWS § 10 (1896), *quoted in Dawson*, 53 A. at 155.

[75] *Id.* § 11.

[76] *Id.* § 12.

[77] *See* Allen v. Allen, 32 A. 166, 167 (R.I. 1895) ("Shellfisheries are public rights which may be regulated for the public good . . . ."); State v. Cozzens, 2 R.I. 561, 563–65 (1850).

General Assembly responded by enacting stronger regulatory programs, such as the Rhode Island Inter-Tidal Wetlands Protection Act of 1965, which restricted activities that would be detrimental to salt marshes, and imposed criminal sanctions on anyone who "dumps or deposits mud, dirt, or rubbish upon, or who excavates and disturbs the ecology of, intertidal salt marshes, or any part of one, without first obtaining a permit."[78] In 1971, the legislature went further, enacting the Coastal Resources Management Act of 1971, which led to the adoption of the Coastal Resources Management Plan (CRMP) in 1976.[79] Under the CRMP, filling of salt marshes is prohibited except where there is a compelling public need.[80]

Unless and until they are extinguished by operation of law, public rights—the *jus publicum*—remain in force, and limit the rights that private parties acquire in public trust waters.[81] In the *Greater Providence* case, the Rhode Island Supreme Court decreed that the legislature could extinguish the public trust through a direct grant of tidelands, resulting in the owners acquiring fee title to the "reclaimed" lands.[82] The court also held that lands filled pursuant to established harbor lines would similarly extinguish the trust.[83] Acknowledging that uncertainty would still remain over the status of some filled lands, the court articulated the following test for determining when the public trust would be extinguished:

> A littoral owner who fills along his or her shore line, whether to a harbor line or otherwise, with the acquiescence or the express or implied approval of the state *and* improves upon the land in justifiable reliance on the approval, would be able to establish title to that land that is free and clear. The littoral owner may pursue a course of action seeking to convey the deed to that property to himself or herself and become the owner in fee-simple absolute *provided* that the littoral owner has not created any interference with the public-trust rights of fishery, commerce and navigation.[84]

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[78] 1965 R.I. Pub. Laws ch. 26, § 1.
[79] Palazzolo v. Rhode Island, 533 U.S. 606, 614–15 (2001).
[80] *Id.* at 615.
[81] *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).
[82] 657 A.2d 1038, 1041 (R.I. 1995).
[83] *Id.* at 1044.
[84] *Id.*

Significantly, the court added this caveat: "The state can, however, at any time, place restrictions on the filling in of shoreline provided it does so before a landowner has changed position in reliance on government permission."[85] In other words, littoral owners cannot "obtain preemptive rights against the state by adverse possession."[86]

The foregoing analysis leads to the conclusion that the public trust doctrine has been a background principle of Rhode Island property law from its earliest days as an English colony, and that owners of riparian and littoral lands have never had the absolute right to fill inter-tidal marshes. At most, they have enjoyed a qualified right—more in the nature of a privilege—to wharf-out and fill with state permission or acquiescence. Though there was a period when the state policy towards filling was quite permissive, there was never a time when the State simply issued a blank check for filling. Statutes such as the 1896 Harbor Commissioners Act recognized the public trust aspects of coastal development and sought to regulate excessive filling, recognizing the harm that resulted from that activity.[87] These regulatory programs became stricter over time. In the modern era, as the legislature began to understand just how crucial it was to preserve salt marshes in order to protect public trust rights, laws such as the 1965 Act were passed. Ultimately, the legislature enacted the 1971 Coastal Resource Management Act, under which the 1976 CRMP was adopted. The CRMP made it clear that filling salt marshes would not be permitted except in cases of compelling public need.

This raises the interesting question of whether, as far as Palazzolo's claim is concerned, these more recent legislative enactments could themselves be considered background principles limiting the use of the property he acquired in 1978. In his majority opinion in *Palazzolo v. Rhode Island*, Justice Kennedy noted that background principles are not confined to common law doctrines, and specifically reserved the question on remand of whether Rhode Island's coastal protection statutes could be considered background principles: "We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."[88] Moreover, Justice Scalia acknowledged in *Lucas v. South Carolina Coastal Council* that

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[85] *Id.*

[86] *See id.* at 1044 n.2.

[87] *See, e.g.*, R.I. GEN. LAWS §§ 3–5, 10–12, 14 (1896) (current version at R.I. GEN. LAWS §§ 46-1-2, 46-6-1 to 46-6-6 (2001) (R.I. GEN. LAWS § 46-6-5 repealed 2002).

[88] 503 U.S. 606, 629 (2001).

where "[t]he use of these properties for what are now expressly prohibited purposes was *always* unlawful, . . . it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."[89] That would seem to be a fair description of what the Rhode Island General Assembly did when it enacted the Coastal Resource Management Act in 1971 in culmination of over two centuries of customs and laws dealing with protection of public rights in tidal waters. Because state law had always recognized the superior rights of the public trust in tidal waters, it was open to the legislature to make explicit what had formerly been implicit, and to restrict uses that had formerly been liberally permitted but which, due to changing circumstances and new knowledge, it had become necessary to prohibit. Once these uses were prohibited, future purchasers could no longer claim any rights or reasonable expectations to engage in them.[90]

In sum, under the public trust doctrine as recognized in Rhode Island common law, constitutional law, case law, and statutory law, Palazzolo never had a cognizable property interest in filling the salt marsh, and thus his claim of deprivation under the Fifth Amendment must fail.[91]

VII. How Other States Have Applied the Public Trust Doctrine in Takings Cases

In the landmark case of *Just v. Marinette County*, the Wisconsin Supreme Court declared that the state has an "active public trust duty" to protect wetlands adjacent to navigable waters.[92] In denying a takings claim based on a county wetlands protection ordinance, the court stated, "What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wet-

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[89] 505 U.S. 1003, 1030 (1992).

[90] *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1255 (D. Nev. 1999) (landowners not entitled to engage in activity prohibited by regulation that pre-dated acquisition), *aff'd in part, rev'd in part*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 122 S. Ct. 1465 (2002); Grant v. S.C. Coastal Council, 461 S.E.2d 388, 391 (S.C. 1995) (post-acquisition landowner "*never* had the right to fill critical area tidelands").

[91] *See* Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 55–56 (1986) (noting that the Constitution is not the source of property rights); Payne v. United States, 31 Fed. Cl. 709, 710–11 (1994) (finding no compensable interest in unpatented mining claim); Plantation Landing Resort, Inc. v. United States, 30 Fed. Cl. 63, 67–69 (1993) (finding no compensable interest in tidelands under Louisiana Code), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994) (table decision).

[92] 201 N.W.2d 761, 768 (Wis. 1972).

lands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty."[93] In its most famous statement, the *Just* court said: "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it is unsuited in its natural state and which injures the rights of others."[94] However, the *Just* case has not been followed by every state which has considered it.[95]

The viability of the *Just* rationale has been called into question in the wake of *Lucas v. South Carolina Coastal Council*.[96] Though it remains good law in Wisconsin[97] and in Florida,[98] the situation has changed in South Carolina. In *Carter v. South Carolina Coastal Council*, the South Carolina Supreme Court endorsed the *Just* rationale.[99] However, in *McQueen v. South Carolina Coastal Council*, the court concluded that *Lucas* implicitly overruled *Carter*.[100] Interestingly enough, the court then proceeded to hold that the owner lacked "investment-backed expectations" because he had acquired the property after the adoption of wetlands regulation.[101] The U.S. Supreme Court granted *certiorari*, and subsequently vacated and remanded the case for further consideration in light of *Palazzolo v. Rhode Island*'s conclusion that the

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[93] *Id.*

[94] *Id.*

[95] *See* Graham v. Estuary Props., Inc., 399 So. 2d 1374, 1382 (Fla. 1981); Rowe v. Town of North Hampton, 553 A.2d 1331, 1335 (N.H. 1989); Am. Dredging Co. v. Dept. of Envtl. Prot., 391 A.2d 1265, 1269–71 (N.J. Super. Ct. Ch. Div. 1978), *aff'd.* 404 A.2d 42 (N.J. Super. Ct. App. Div. 1979); Orion Corp. v. State, 747 P.2d 1062, 1073 n.10, 1083 (Wash. 1987). *But see* Gil v. Inland Wetlands and Watercourses Agency, 580 A.2d 539, 545 (Conn. App. Ct. 1990), *cert. granted in part*, 582 A.2d 205 (Conn. 1990), *rev'd on other grounds*, 593 A.2d 1368 (Conn. 1991); State v. Johnson, 265 A.2d 711, 714–16 (Me. 1970).

[96] *See* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1438–40 (1993).

[97] *See* Zealy v. City of Waukesha, 548 N.W.2d 528, 534–35 (Wis. 1996).

[98] *See* City of Riviera Beach v. Schillingburg, 659 So. 2d 1174, 1183 (Fla. Dist. Ct. App. 1995).

[99] 314 S.E.2d 327, 329 (S.C. 1984).

[100] 350 S.E.2d 628, 632–33 (S.C. 2000), *cert. granted and vacated sub nom.* McQueen v. S.C. Dep't of Health & Envtl. Control, 314 S.E.2d 327 (2001) (remanding to the Supreme Court of South Carolina in light of Palazzolo v. Rhode Island, 533 U.S. 606 (2001)).

[101] *Id.* at 634–35 (noting that owner's "prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations").

mere existence of pre-acquisition regulations does not bar a takings claim, but must be considered as part of the *Penn Central* factors.[102]

Orion Corp. v. State illustrates how the public trust doctrine has been applied in tidal marshes on the West Coast.[103] The Orion Corporation planned to build a residential community on dredged and filled tidelands in Padilla Bay, but was blocked by a series of state coastal laws limiting such development. Orion claimed a taking. After determining that "title in and sovereignty over Washington's tidelands and shorelands vested in the state upon admission to the Union," the Washington Supreme Court applied the public trust doctrine to Orion's tidelands.[104] The court compared the public trust doctrine to a "covenant running with the land," stating that Orion "had no right to make any use of the its property that would substantially impair the public rights of navigation and fishing."[105] Ultimately, the court concluded, "Orion never had the right to dredge and fill its tidelands, either for a residential community or farmlands."[106]

New Jersey took a slightly different path to the same result in *Karam v. State*.[107] In that case, a riparian owner purchased land on the Manaquan River and applied for a permit to build a dock. The permit was denied because the riparian land was designated a "special restricted area" due to its importance to shellfish production.[108] The court cited *Illinois Central Railroad Co. v. Illinois* for the proposition that "ownership of and dominion and sovereignty over lands covered by tide waters . . . belong to the respective states within which they are found."[109] The court held that although the sovereign has inherent authority to convey riparian grants to private parties, "the sovereign never waives its right to regulate the use of public trust property."[110] The court concluded that the plaintiffs did not have any legitimate, investment-backed expectations of construction rights in the marsh.[111]

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[102] *See Palazzolo*, 533 U.S. at 629–30 (2001); *id.* at 633 (O'Connor, J., concurring); *id.* at 643 n.6, 644–45 (Stevens, J., concurring in part, dissenting in part); *id.* 654 n.3 (Ginsburg, Souter & Breyer, JJ., dissenting); *id.* at 654–55 (Breyer, J., dissenting).

[103] 747 P.2d 1062 (Wash. 1987).

[104] *Id.* at 1072.

[105] *Id.* at 1072–73.

[106] *Id.* at 1073.

[107] 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 723 A.2d 943 (N.J. 1999).

[108] *Id.* at 1223.

[109] *Id.* at 1228 (quoting Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892)) (first alteration in original).

[110] *Id.*

[111] *Id.* at 1229.

The doctrine of custom, which is closely aligned with the public trust doctrine, was recognized as a background principle in the denial of a takings claim in *Stevens v. City of Cannon Beach.*[112] *Stevens* involved a suit by owners of beachfront property who sought to build a seawall on the dry sand portion of the beach. The permit was denied and the owner sued for inverse condemnation. The Oregon Supreme Court decided that the law of custom is a background principle of state law, and since the public had continuously used the beaches along the entire coastline "from the time of the earliest settlement to the present day," the plaintiff had no right to build anywhere on the beach.[113] The court specifically reserved the question of whether the public trust doctrine would be a background principle that would also bar a takings claim.[114] The U.S. Supreme Court denied *certiorari* over a dissenting opinion by Justice Scalia.[115] While acknowledging that the Constitution leaves the law of real property to the states, Justice Scalia expressed doubts as to whether the requirements of custom had actually been met in the case.[116]

The guarantee that the public shall enjoy the "privileges of the shore" embodied in Section Seventeen of Article I of the Rhode Island Constitution is a manifestation of the customary uses that the public has made of tidal waters including fishing and clamming.[117] To give effect to these public rights, the State, as trustee, must have the power to protect the corpus of the trust, which necessarily includes the salt marsh. Simply put, without salt marshes there would be no fish or clams for the public to enjoy.

VIII. Nuisance as an Evolving Background Principle

By definition, property ownership does not include the right to create unlawful nuisances.[118] Under the "nuisance exception," the U.S. Supreme Court has repeatedly ruled that government is not required to compensate owners for restricting activities considered a

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[112] 854 P.2d 449, 456–57 (Or. 1993).

[113] *Id.* at 453, 456–57.

[114] *Id.* at 453 n.11.

[115] Stevens v. City of Cannon Beach, 114 S. Ct. 1332 (1994) (mem.) (Scalia & O'Connor, JJ., dissenting), *denying cert. to* 854 P.2d 449 (Or. 1993), *aff'g*, 835 P.2d 940 (Or. Ct. App. 1992).

[116] *Id.* at 1335 n.4.

[117] *See* State v. Cozzens, 2 R.I. 561, 563–65 (1850).

[118] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491–92 (1987). "[N]o individual has a right to use his property so as to create a nuisance or otherwise harm others." *Id.* at 492 n.20.

nuisance under state law.[119] The Court has recognized that nuisance law is an evolving concept that expands as knowledge, needs, and social values change.[120] As the California Court of Appeal observed in ruling that the filling in of San Francisco Bay had reached the point where it had become a public nuisance:

> In short, the police power, as such, is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public; that is to say as a commonwealth develops politically, economically, and socially the police power likewise develops, within reason, to meet the changed and changing conditions.[121]

This expansive view of the nuisance exception was questioned in *Lucas v. South Carolina Coastal Council* by Justice Scalia, who eschewed "noxious use logic" as a basis for justifying "newly legislated" limitations on property.[122] Justice Scalia criticized the "harm-benefit dichotomy," under which lower courts often seek to distinguish between compensable and non-compensable exercises of the police power by examining whether the regulation is harm-preventing or benefit-conferring.[123] Dismissing this as largely an exercise in semantics, Justice Scalia stated: "[T]he distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern . . . ."[124] Though appearing to limit the takings exception to classic common law nuisances, Justice Scalia did concede that "changed circumstances or new knowledge may make what was

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[119] *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) (finding no taking in the case of a gravel mining ban); Mugler v. Kansas; 123 U.S. 623, 665 (1887) ("[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.").

[120] *See generally* John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993).

[121] Candlestick Props., Inc. v. S.F. Bay Conservation & Dev. Comm'n, 89 Cal. Rptr. 897, 905 (Cal. Ct. App. 1970) (quoting Miller v. Bd. of Pub. Works, 234 P. 381, 383 (Cal. 1925)).

[122] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026–29 (1992).

[123] *See* ROBERT MELTZ, CONG. RESEARCH SERV., C.R.S. REPORT FOR CONGRESS, RL30423: WETLANDS REGULATION AND THE LAW OF PROPERTY RIGHTS "TAKINGS," at 9–12 (Feb. 17, 2000), *available at* http://www.cnie.org/nle/crsreports/wetlands/wet-6.cfm#InvestmentHarm/benefit.

[124] *Lucas*, 505 U.S. at 1026.

previously permissible no longer so."[125] Further, he stated: "It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police power . . . ."[126]

Justice Kennedy, in his concurring opinion in *Lucas*, went further:

> The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex interdependent society. . . . The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment.[127]

The *Lucas* Court set out several tests, drawn from the *Restatement (Second) of Torts*, for analyzing whether the nuisance exception should apply to a total taking: "[T]he degree of harm to public land and resources, or adjacent private property, posed by claimant's proposed activities, . . . the social value of the claimant's activities and their suitability to the locality in question, . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent landowners) alike . . . ."[128] Applying these tests to Palazzolo's situation, it seems fairly obvious that the activity he proposes meets even Justice Scalia's narrow definition of a nuisance.

First, as the state trial court judge found, Palazzolo's proposed filling will harm "public resources," such as fish, shellfish, and water quality, as well as public health:

> The CRMC introduced evidence that the filling of 18 acres of salt marsh would reduce the existing salt marsh in Winnapaug Pond by 12 percent. In addition, the evidence showed that a 12 percent reduction in the salt marsh in Winnapaug Pond would cause a reduction in the commercial and recreational shellfish and finfish populations in Rhode Island.

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[125] *Id.* at 1031.

[126] *Id.* at 1026.

[127] *Id.* at 1035 (Kennedy, J., concurring) (citations omitted).

[128] *Id.* at 1030–31 (citations omitted); *see, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 826–28, 830 (1979).

> Moreover, the evidence indicated that the 12 percent loss of the total salt marsh in the Winnapuag Pond will have a significant detrimental impact on the existing salt marsh filtering mechanisms within the pond which could be expected to result in increased harmful nitrate levels within the pond. The evidence illustrated that high levels of nitrate in groundwater poses a public health threat because ground water is the sole source of drinking water.[129]

Based on these findings, Judge Williams ruled that Palazzolo's proposal would constitute a public nuisance.[130] This ruling is in line with prior Rhode Island cases.

In *Milardo v. Coastal Resources Management Council*, the owner of property abutting Winnapaug Pond was denied a permit to construct a summer home using an individual sewage disposal system because the council concluded that the system would result in "the introduction of nitrogens, nitrants [sic], and phosphates into the marsh in significant amounts."[131] Noting that "[a]reas that were previously considered valueless wetlands are now recognized as important ecological resources," and that "[a]ctivities that have previously been considered harmless may come to be recognized as serious threats to the public well-being," the Rhode Island Supreme Court ruled that the permit denial was a valid exercise of the police power to protect public health and safety.[132] By contrast, in *Annicelli v. Town of South Kingston*, the court ruled that denial of a permit to build a single family dwelling on a barrier beach was a taking "for a public good" that deprived the owner of all economic use of the property.[133] Although it recognized the ecological significance of barrier beaches, the court reasoned that "the police power may properly regulate the use of property only where uncontrolled use would be harmful to the public."[134]

These two cases illustrate nicely the harm-benefit dichotomy, but this approach to takings analysis may no longer be viable in light of the Justice Scalia's dictum in *Lucas*. However, where the harm caused

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[129] Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 88-0297, 1997 WL 1526546, at *5 (R.I. Super. Ct. Oct. 24, 1997); *aff'd on other grounds sub nom.* Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part, remanded sub nom.* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[130] *Id.*

[131] 434 A.2d 266, 268 (R.I. 1981) (quoting the CRMC's final decision).

[132] *Id.* at 269.

[133] 463 A.2d 133, 139–41 (R.I. 1983).

[134] *Id.* at 141.

by the use of property rises to the level of a nuisance, it can still be prohibited without compensation. Activities that threaten public health, such as contamination of drinking water, would clearly qualify as nuisance. Activities that threaten ecological damage, on the other hand, have not always been seen as nuisance-like.

In addition to creating a public nuisance, Palazzolo's proposal would harm adjacent private property by increasing erosion and flooding. In *Lucas*, Justice Scalia cited this kind of effect as an example of nuisance-like activity: "[T]he owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land."[135] Similarly, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court pointed to the impact on other owners of land subsidence caused by coal mining as a justification for a state regulation requiring that coal pillars be left in place to provide support.[136]

Second, based on the record, there is little or no social value to the activity that Palazzolo proposes. He simply wishes to develop the property for private economic gain. In fact, he was denied the permit on the ground that he had provided no evidence of any public need or benefit from any of the various development schemes he had proposed.[137] Further, the proposed filling is not "suitable for the locality of the subject property."[138] The salt marsh around Winnapaug Pond remains essentially intact. Development in this area has largely been confined to the uplands. There is no evidence to suggest that Palazzolo has been singled out for disparate treatment by the State.

Third, the harm here is easily avoided. All that Palazzolo has to do is leave the marsh alone. That would still leave him with the three essential attributes of ownership—the right to possess, to exclude

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[135] 505 U.S. 1003, 1029 (1992).

[136] 480 U.S. at 491–92. "[T]he State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Id.* at 492 n.20; *accord* M & J Coal Co. v. United States, 47 F.3d 1148, 1154 (Fed. Cir. 1995) (coal company "never acquired the right to mine in such a way as to endanger the public health and safety"); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125–26 (1978) (where health, safety, or general welfare would be promoted by particular contemplated uses of land, compensation need not accompany prohibition).

[137] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 615 (2001).

[138] Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 88-0297, 1997 WL 1526546, at *5 (R.I. Super. Ct. Oct. 24, 1997), *aff'd on other grounds sub nom.* Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part, remanded sub nom.* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

others, and to dispose of the property.[139] A prohibition on a single use—one "stick" in the full "bundle"—does not constitute a taking even where the use is not a nuisance.[140]

IX. Wetlands Filling as Nuisance-Like Activity

Rhode Island has long considered the unpermitted filling of salt marshes to be a nuisance. The 1896 Harbor Commissioners Act provided that "[e]very erection made into or encroachment upon the public tide-waters of the state, not authorized by the General Assembly or by the harbor commissioners, shall be deemed to be a public nuisance and shall be prosecuted by the attorney-general."[141]

Under Rhode Island law, a public nuisance is defined as an "unreasonable interference with a right common to the general public; it is behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community."[142] Activities that damage shellfisheries have long been considered a public nuisance.[143] Septic discharge into public waters is also recognized as a public nuisance.[144]

A number of other state courts have ruled that dredging and filling of wetlands are nuisance-like activities that can be regulated without running afoul of the Takings Clause. In *Claridge v. New Hampshire Wetlands Board*, the New Hampshire Supreme Court held that denial of a permit to fill tidal marshes was not a taking because filling the marsh would have "irreparably diminished the marsh's nutrient producing capability for coastal habitats and marine fisheries."[145] While recognizing that plaintiffs bore a heavier burden than the public at large, the court found that the burdens were not "unreasonably onerous" in light of the "risk which the [property owners] chose to take in buying this lot with notice of the regulatory impediments and in waiting to develop the property in the context of growing public concerns about wetland resources."[146] The court's reasoning is instructive:

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[139] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

[140] Andrus v. Allard, 444 U.S. 51, 65–66 (1979).

[141] R.I. Gen. Laws § 14 (1896) (current version at R.I. Gen. Laws § 46-6-3(2001)).

[142] Citizens for Pres. of Waterman Lake v. Davis, 420 A.2d 53, 59 (R.I. 1980).

[143] *See* Payne & Butler v. Providence Gas Co., 77 A. 145, 151 (R.I. 1910).

[144] *See* Bd. of Purification of Waters v. City of East Providence, 133 A. 812, 814 (R.I. 1926).

[145] 485 A.2d 287, 292 (N.H. 1984).

[146] *Id.*

> The dangers associated with filling wetlands have only recently become widely known. However, the public policy of the State has recognized the importance of these wetlands, and strong regulations to protect wetlands have been enacted. The regulations call for some sacrifices from all, in that land otherwise ideally situated for private development is effectively rendered unavailable for that purpose.[147]

In *Graham v. Estuary Properties, Inc.*, the Florida Supreme Court held that the denial of a permit to destroy 1800 acres of mangrove swamp was a valid exercise of the police power, rather than a taking, because it was necessary to avoid "unreasonable pollution of the waters thereby causing attendant harm to the public."[148] The court acknowledged the difficulty of drawing the line between prevention of a public harm and the creation of a public benefit, but reasoned that the restriction was simply "maintaining the status quo."[149] The court also noted that the developer "had only its own subjective expectation that the land could be developed in the manner it now proposes."[150]

In the case of *In re Gazza v. New York State Department of Environmental Conservation*, the New York Supreme Court held that denial of a variance for construction on tidal wetlands was not a taking because the owner acquired the property two years after the regulation took effect. The court stated that "[t]he relevant property interests owned by the petitioner are defined by those State laws enacted and in effect at the time he took title and they are not dependent on the timing of State action pursuant to such state laws."[151]

However, the argument that filling wetlands can be prohibited as a nuisance-like activity has fared less well at the federal level. In *Florida Rock Industries, Inc. v. United States*, the Court of Appeals for the Federal Circuit, which hears appeals of federal takings claims, ruled that denial of a dredge and fill permit under the Clean Water Act was a taking because filling wetlands—unlike putting toxic waste in drinking water—caused no real harm and it was unfair to expect landowners to maintain wetlands at their own expense.[152] The United States Claims Court reached the same result in *Loveladies Harbors, Inc. v.*

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[147] *Id.*

[148] 399 So. 2d 1374, 1381 (Fla. 1981).

[149] *Id.* at 1382.

[150] *Id.* at 1383.

[151] *In re* Gazza v. N.Y. State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1040–41 (N.Y. 1997).

[152] 791 F.2d 893, 904 (Fed. Cir. 1986).

United States, holding that building houses on wetlands is not a harmful activity.[153]

These ill-informed, unscientific views of some members of the federal judiciary should have no bearing on how the Rhode Island Supreme Court comes to view Palazzolo's situation. As *Lucas v. South Carolina Coastal Council* makes clear, it is up to state courts to define the nuisance law of the State. In Rhode Island, coastal wetlands have always been treated as unique areas where public rights limit private rights, and where the unpermitted filling of wetlands, as well as the resulting pollution of shellfish habitat, is considered a public nuisance. This being true, Rhode Island nuisance law provides another basis for concluding that Palazzolo never had a right to fill the marsh.

X. Applying the *Penn Central* Factors

The foregoing discussion of background principles is also relevant to the analysis of Palazzolo's claim under the three-part test for partial takings of *Penn Central Transportation Co. v. City of New York*. Indeed, it is often difficult to distinguish background principles from investment-backed expectations.[154] In fact, the *Palazzolo v. Rhode Island* decision muddles the analysis even more by eliminating the bright line "notice rule," under which owners who took title after regulations were in effect were per se barred from asserting a takings claim.[155] *Palazzolo* adds confusion because it is not clear from the Court's plurality opinion (1) when a statute should be considered a background principle that effectively removes one or more sticks from the bundle of rights that subsequent owners acquire; (2) when it renders an owner's expectations unreasonable, thereby defeating a takings claim; or (3) when, if ever, it should be discounted altogether (e.g., in a total takings case).

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[153] 15 Cl. Ct. 381, 388–89 (1988).

[154] *See generally* Robert L. Glicksman, *Making a Nuisance of Takings Law*, 3 WASH. U. J.L. & POL'Y 149 (2000); R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449 (2001).

[155] *See* Good v. United States, 189 F.3d 1355, 1361–63 (Fed. Cir. 1999) (Florida developer lacked reasonable expectation that he would be able to get wetland permits necessary to fully develop property). *But see* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987) ("Nor are the [property owners'] rights altered because they acquired the land well after the Commission had begun to implement its policy."); Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1362–64 (Fed. Cir. 2000) (reasonableness of owner's expectations is irrelevant to analysis of whether a regulation effects a categorical taking), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000), *reh'g en banc denied*, 231 F.3d 1365 (Fed. Cir. 2000).

One of the first post-*Palazzolo* cases to address this problem was *Rith Energy, Inc. v. United States.*[156] In *Rith*, a mining company claimed that coal-mining regulation under the federal Surface Mining Control and Reclamation Act (SMCRA) caused a ninety-one percent reduction in the amount of coal the company was able to remove.[157] Both the Claims Court and the Federal Circuit denied the claim, ruling that because Rith was not denied all economic use or value there was no categorical taking, and further ruling that because Rith acquired the property after the SMCRA regulatory program was in place, Rith had no reasonable expectation that it could mine all the coal.[158] After *Palazzolo* was decided, Rith moved for a re-hearing, arguing that the existence of regulations on the date of its acquisition was irrelevant, that it was "entitled to stand in the shoes of its predecessors who owned before SMCRA."[159] On rehearing the Federal Circuit rejected this argument: "In sum, our conclusion that reasonable investment-backed expectations play an important role in regulatory takings cases is not inconsistent with anything in the Supreme Court's decisions in *Nollan* and *Palazzolo.*"[160] The *Rith* court noted that the Supreme Court has consistently reaffirmed the importance of evaluating investment-backed expectations in regulatory takings cases.[161]

In Palazzolo's case, the conclusion that he lacked any reasonable investment-backed expectation seems inescapable, given the regulatory history of coastal wetlands protection in Rhode Island. Indeed, for the reasons already discussed, that history suggests that neither he nor his predecessors in title ever had an unqualified right to fill. But even if the Rhode Island courts rejected the public trust and nuisance doctrine as controlling background principles, they would have to factor them into an analysis of whether Palazzolo's expectations following his 1978 acquisition of the property were reasonable. The only logical conclusion is that coastal development was a highly regulated activity long before 1978, and that no one acquiring property in that

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[156] 270 F.3d 1347, 1350–51 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 2660 (2002).

[157] *Id.* at 1349.

[158] *Id.*; *see* Rith Energy, Inc. v. United States, 44 Fed. Cl. 108, 115 (1999).

[159] Rith Energy, Inc. v, United States, 270 F.3d 1347, 1350 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 2660 (2002).

[160] *Id.* at 1351.

[161] *Id.* at 1350–51. In *Rith*, the Federal Circuit observed that "among the factors entitled to 'particular significance' in regulatory takings analysis is the regulation's 'interference with investment-backed expectations.'" *Id.* (quoting E. Enters. v. Apfel, 524 U.S. 498, 523 (1998)).

time frame could reasonably expect to be handed a permit to fill salt marsh.

The other *Penn Central* factors are no more availing to Palazzolo. In terms of diminution of value, the U.S. Supreme Court has already said that Palazzolo's parcel "retains significant worth for construction of a residence."[162] The record suggests that this residence is worth $200,000. That figure may change, up or down, as a result of further factual development on remand. But assuming it is in the ballpark, and even accepting Palazzolo's inflated estimate of the property's market value of $3.1 million, the alleged deprivation is roughly equivalent to the ninety-one percent reduction in value in the *Rith* case.[163] It is also possible that the deprivation ultimately will be found to be substantially less than that.

The key variable in calculating diminution is the so-called parcel-as-a-whole, or "denominator," rule.[164] Under this rule, the use and value of the entire parcel must be taken into account, not just the portion burdened by the regulation. As the Supreme Court said in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*: "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question."[165] The Supreme Court refused to consider Palazzolo's argument that only the wetland portion of his parcel should be considered because the argument was being raised for the first time on appeal.[166] Should Palazzolo attempt to argue this point on remand, he will face a new obstacle in the form of the Supreme Court's latest takings decision, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[167] discussed below.

The *Rith* court summed up the analysis of the "diminution" factor this way:

> Although the regulatory action in this case caused a substantial diminution in the value of Rith's coal leases, it did not deprive Rith of its opportunity to make a profit on the leases; it simply reduced the margin of profit that Rith had

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[162] Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001).

[163] *See* 270 F.3d at 1349.

[164] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).

[165] 508 U.S. 602, 644 (1993).

[166] *Palazzolo*, 533 U.S. at 631.

[167] 122 S. Ct. 1465 (2002).

> hoped to achieve. The record reflects that the coal that Rith was able to mine resulted in a substantial profit for its investors in light of the price paid for the coal lease.[168]

According to the record in *Palazzolo*, Palazzolo retains the ability to build a "substantial residence," worth about $200,000 on the small upland portion of the property.[169] This would not be a bad return on his initial investment of $13,000.[170] Although he is claiming $3.1 million in damages for lost development potential, the Fifth Amendment protects "economically viable" uses, not the most profitable.[171]

The final *Penn Central* factor is the character of the government action.[172] There is considerable debate about what the *Penn Central* Court meant by this criterion and what weight it should be given. It appears that the Court was mainly concerned with whether the government action would result in a physical invasion of the subject property as opposed to a use restriction. Physical invasions, no matter how small, are categorical takings requiring automatic compensation.[173] Use restrictions, on the other hand, require a more searching investigation of the facts and circumstances of each case, and a weighing of the benefits and burdens of regulations, with the ultimate test being whether the regulation singles out individuals for burdens that ought to, in fairness, be borne by society at large.[174]

Beyond physical takings, however, it is not clear what the "character" element of the *Penn Central* analysis is supposed to mean. In one sense, it should not matter what objective the government has in mind for restricting the use of property. Indeed, the legitimacy of the government action should not even be an issue in a "true" takings

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[168] 270 F.3d at 1352.

[169] *Palazzolo*, 533 U.S. at 631.

[170] Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 88-0297, 1997 WL 1526546, at *6 (R.I. Super. Ct. Oct. 24, 1997); *aff'd on other grounds sub nom.* Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part, remanded sub nom.* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[171] *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Deltona Corp. v. United States, 657 F.2d 1184, 1192 (Ct. Cl. 1981); Allegria v. Keeney, 687 A.2d 1249, 1253–54 (R.I. 1997) (no taking where there was a fifty percent diminution in value); Annicelli v. Town of South Kingstown, 463 A.2d 133, 140 (R.I. 1983) (finding that a "property owner does not have a vested property right in maximizing the value of his property").

[172] *See* 438 U.S. 104, 124 (1978).

[173] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426–28, 438 n.16 (1982).

[174] *See* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223–24 (1986).

case.[175] If there is a question about the legality of the government action, that ought to be resolved in a separate proceeding leading to a different remedy than compensation.[176]

Nevertheless, the lines do blur. In *Nollan v. California Coastal Commission*, for example, the Court held a regulation requiring beachfront property owners to provide public access to the beach in exchange for a building permit was a taking because there was an insufficient nexus between the means and the ends. In *Dolan v. City of Tigard*, the Court held that a requirement that a landowner dedicate a portion of her property as a buffer along a stream to control runoff would be a taking unless the state demonstrates a "rough proportionality" between the required dedication (i.e. the size of the buffer) and the problem being addressed (i.e. the amount of runoff contributed by her development). Some commentators suggest that *Nollan* and *Dolan* are better understood as substantive due process cases.[177] The Court itself acknowledges the difficulty of drawing doctrinal lines between compensable takings and substantive due process violations.[178]

In Palazzolo's case, the State of Rhode Island is exercising its police power to prevent a public nuisance that would cause irreparable harm to a public trust resource, create a potential public health threat, and interfere with other property owners use of common resources like Winnapaug Pond. What Rhode Island seeks to do is similar to what the State of Pennsylvania was doing in the Keystone. The coal pillars that the State required to be left in place to support the land surface, and prevent subsidence that would threaten the

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[175] *See* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987); *Agins*, 447 U.S. at 260. The Supreme Court in both *Dolan* and *Nollan* noted that a "land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' *and* does not 'deny an owner economically viable use of his land." *Dolan*, 512 U.S. at 385 (quoting *Agins*, 447 U.S. at 260) (emphasis added); *Nollan*, 483 U.S. at 834 (quoting *Agins*, 447 U.S. at 260). The *Agins* Court first stated this test, but in the disjunctive. 447 U.S. at 260.

[176] John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ENVTL. L. REP. 11,112, 11,121 (2001).

[177] *See generally, e.g.*, Lawrence Berger, *Public Use, Substantive Due Process and Takings—An Integration*, 74 NEB. L. REV. 843 (1995); Edward J. Sullivan, *Substantive Due Process Resurrected through the Takings Clause:* Nollan, Dolan, *and* Ehrlich, 25 Envtl. L. 155 (1995).

[178] Yee v. City of Escondido, 503 U.S. 519, 523 (1992) (regulatory takings cases "necessarily entail[] complex factual assessments of the purposes and economic effects of government actions"); Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104, 127. In *Penn Central*, the Court observed that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . *or* perhaps if it has an unduly harsh impact upon the owner's use of the property." 438 U.S. at 127 (emphasis added) (citations omitted).

groundwater and damage private homes, is analogous to Rhode Island's requirement that salt marshes be left intact, to provide ecological support for water quality, fisheries, commercial and recreational activity, and private property values (including Palazzolo's). Salt marshes, even more than coal pillars, perform socially important functions that justify the impact on the private owner's profit margin.

XI. The Latest Word from the Supreme Court: The *Tahoe-Sierra* Decision

On April 24, 2002, just as this article was being wrapped up, the Supreme Court handed down its decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[179] In an important victory for state and local land use agencies, as well as for protection of ecologically sensitive resources, the Court, by a six to three margin, rejected a categorical takings claim based on a thirty-two-month development moratorium on property around Lake Tahoe.[180] A thorough exploration of Justice Stevens' thoughtful majority opinion is beyond the scope of this piece, except to highlight those aspects of the decision with relevance to *Palazzolo v. Rhode Island.*

First, in recognizing the "unique beauty" and vulnerability of Lake Tahoe, the *Tahoe-Sierra* Court showed a keener appreciation for the role of government land use regulation than the *Palazzolo* Court. Justice Kennedy's opinion in *Palazzolo* made no mention of the ecological importance of salt marshes or the irreparable harm that improper development can do to the public interest and community values in such resources. In contrast, Justice Stevens emphasized these considerations:

> Lake Tahoe's exceptional clarity is attributed to the absence of algae that obscures the waters of most other lakes. Historically, the lack of nitrogen and phosphorous, which nourish the growth of algae, has ensured the transparency of its waters. Unfortunately, the lake's pristine state has deteriorated rapidly over the past 40 years; increased land development in the Lake Tahoe Basin . . . has threatened the "noble

[179] 122 S. Ct. 1465 (2002).
[180] *Id.* at 1489.

> sheet of blue water" beloved by [Mark] Twain and countless others.[181]

Second, and more substantively, the Court reaffirmed with gusto the "parcel as a whole" rule requiring that a takings claim be evaluated in relation to the claimant's entire property, not just the restricted portion.[182] The claimants in *Tahoe-Sierra* argued that a regulation that prohibits all economic use for any period of time constitutes a *Lucas*-type per se taking.[183] The Court decisively rejected this attempt to sever property into discrete "temporal segments."[184] Justice Stevens stated:

> Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban. . . . Petitioners' "conceptual severance" is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on "the parcel as a whole." . . . .
>
> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest.[185]

Although most observers believed this was always the law, commentators have criticized the "parcel as a whole" rule, and the Court itself had expressed some doubts about it.[186] In *Palazzolo*, Justice Ken-

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[181] *Id.* at 1471 (quoting the lower court opinion, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226, 1230 (D. Nev. 1999), which, in turn, quotes MARK TWAIN, ROUGHING IT 169 (facsimile reprint of 1st ed., Hippocrene Books, n.d.) (1872)).

[182] *Id.* at 1481, 1483, 1484 & n.26.

[183] *Id.* at 1480.

[184] *Id.* at 1483.

[185] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1483–84 (2002) (citations omitted).

[186] *See* Lucas v S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 16–17 (1987). The *Lucas* Court stated:

> When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

505 U.S. at 1016 n.7.

nedy noted this criticism, but declined to explore it.[187] The *Tahoe-Sierra* decision resolves the uncertainty in favor of viewing the State's denial of the wetlands permit as "merely caus[ing] a diminution in value" of Palazzolo's "parcel as a whole."[188]

In support of its conclusion on the whole parcel issue, the Court drew a sharp distinction between takings claims based on physical invasions and those based on restricting the use of private property.[189] A taking claim based on a physical occupation necessarily focuses on the portion occupied, but that has no bearing on the application of the whole parcel rule in the context of a regulatory use restriction.[190]

Finally, the *Tahoe-Sierra* decision recognizes the "reciprocity of advantage" that regulatory restrictions can provide.[191] Because the moratorium that was the subject in *Tahoe-Sierra* applied broadly to all property owners in the Lake Tahoe Basin, it was an equitable way to insure that the overall quality of the lake would be maintained for everyone's benefit. Similarly, owners of coastal property in Rhode Island benefit from a prohibition on the filling of salt marshes, which is necessary to maintain the ecological health of Winnapaug Pond and the estuarine environment that makes the location so attractive for development. It is reasonable to assume that property values would decline in response to the degradation of these resources. "While each of us is burdened somewhat by such restrictions, we, in turn, benefit from the restrictions that are placed on others."[192]

Conclusion

While I do not agree with Anthony Palazzolo's takings claim, I admire his dogged efforts to fight for what he believes in. I wish our economic system did not force such hard choices on owners of environmentally sensitive lands. In the economy of nature, the "highest and best use" of a salt marsh is a salt marsh. Only in the perverse world of market economics is a beach club worth more than salt marsh.

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[187] 533 U.S. 606, 631–32.

[188] *See* 122 S. Ct. at 1484.

[189] *See id.* at 1478–79 ("This longstanding distinction . . . makes it inappropriate to treat cases involving physical takings as controlling precedent for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."); *see also* Palazzolo v. Rhode Island, 533 U.S. 606, 628–29 (2001).

[190] *See Tahoe-Sierra*, 122 S. Ct. at 1478–79.

[191] *See id.* at 1489.

[192] Keystone Bituminous Coal Ass'n v. Mahon, 480 U.S. 470, 491 (1987).

As a matter of law, Palazzolo does not have a valid takings claim because he lacks the fundamental predicate of a cognizable property interest under the laws of Rhode Island. As a matter of policy, one might wish for a more enlightened governmental approach that would actually encourage and reward individuals who forego development in favor of restoring, maintaining, and enhancing important ecological resources. For the most part, our tax and fiscal policies tend to reward activities that degrade and exhaust natural resources.[193] We need to shift to policies that reward conservation of the earth's declining stock of natural capital.

[193] *See generally* PAUL HAWKEN ET AL., NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION (Back Bay Books 2000); DAVID MALIN ROODMAN, THE NATURAL WEALTH OF NATIONS: HARNESSING THE MARKET FOR THE ENVIRONMENT (1998).